IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5928

DEWAYNE WALLER
Appellant,

v.

UNITED STATES OF AMERICA
Appellee.

ON APPEAL FROM THE DISTRICT
OF COLUMBIA COURT OF APPEAL

JURISDICTIONAL STATEMENT

Wilhelmina Reuben Cooke
1424 16th Street, N.W.
Suite 404
Washington, D. C. 20036

(Appointed by the District
of Columbia Court of Appeals)

December 21, 1978

INDEX

TABLE OF CITATIONS

CASES:

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the District of Columbia Court of Appeals, entered on July 5, 1978, affirming the judgment of conviction of the Superior Court of the District of Columbia and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals is at ___ D.C. App. ___, Nos. 10881, Slip Op., ___ A.2d ___ (July 5, 1978). Copies of the opinion, judgment, order denying rehearing en banc, and of the notice of appeal are attached hereto as Appendix A.

JURISDICTION

This appeal was brought under §11-721 of the D.C. Code (Supp. IV, 1971) to set aside the judgment of conviction entered by the Superior Court of the District of Columbia. The judgment of the Court of Appeals was entered on July 5, 1978, and notice of appeal was filed in that court on November 15, 1978. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: Charleston Federal Savings and Loan Association v. Alderson, 324 U.S. 182, 185; Raley v. State of Ohio, 360 U.S. 423; Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278. This Court's jurisdiction is also invoked under Title 28, United States Code, Sections 1257(3) and 2103 with respect to "any other denial of federal right whether or not capable in itself of being brought here by appeal." The following cases sustain the Supreme Court's jurisdiction to review the nonappealable issues here presented: Prudential Insurance Company v. Cheek, 259 U.S. 530, 547; Mattox v. United States, 146 U.S. 140; Remmer v. United States, 347 U.S. 22.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sections 22-2401 and 22-105 (1973 ed.) and Amendments Fifth, Sixth and Eighth to the Constitution are set forth in Appendix B hereto.

QUESTIONS PRESENTED

1. Whether denial of Appellant's motion for a mistrial where the Government failed to carry the burden of rebutting the presumption of prejudice arising from an unauthorized communication with a juror violated Appellant's right under the Sixth Amendment to the United States Constitution?

2. Whether Appellant's conviction of first degree felony murder was illegal because the interpretation of 22 D.C. Code 2401, coupled with the aiding and abetting principle of 22 D.C. Code 105, as employed by the Court in charging the jury respecting Appellant, violated Appellant's rights under both the Fifth and Eighth Amendments to the United States Constitution?

3. Whether Appellant's simultaneous conviction and separate sentencing for first-degree felony murder and the underlying felony of attempted armed robbery is barred by the Double Jeopardy Clause of the Fifth Amendment?

STATEMENT

PROCEEDINGS BELOW

The homicide involved in this case occurred during the course of an alleged armed robbery and burglary of an apartment in the District of Columbia on the morning of February 19, 1975. The trial began in the

Superior Court for the District of Columbia on March 11, 1976, and continued to March 15, 1976, at which time the trial was recessed until March 22, 1976. Proceedings were resumed on March 22, 1976. On March 25, 1976, the jury returned its verdict, finding the Appellant Waller guilty of one count each of felony murder, first degree burglary while armed, attempted armed robbery, assault with a dangerous weapon and carrying a pistol without a license, three counts of armed robbery, and three counts of assault with intent to commit armed robbery.

On May 11, 1976, the trial judge imposed the following sentences upon Appellant: 20 years to life for felony murder; 20 years to life for burglary in the first degree while armed; 10 years for attempted armed robbery; 20 years to life for each of three counts of armed robbery; 20 years to life for each of three counts with intent to commit robbery while armed; 3 to 10 years for assault with a dangerous weapon; and 3 to 10 years for carrying a pistol without a license. The first two sentences were ordered to be served consecutively, the remaining to be served concurrently. On May 12, 1976, the trial judge corrected the above sentences amending the original Judgment and Commitment Order to impose minimum sentences of 15 years where 20 years was originally ordered, except for the felony murder count.

Trial proceedings in this case were interrupted for one week. When the proceedings were resumed, the

trial judge advised counsel that, on the last day before the adjournment, one of the alternate jurors had reported to him that she had been threatened with respect to the verdict. (T2, 9.)[1/] The court then advised counsel that the juror had been segregated and separated from the other members of the jury from the time that she had arrived that morning and that "if she followed the court's instructions and if all the other members of the jury followed the court's instructions between last Monday and this date, she has not discussed this matter with them or with anyone else." (T2, 10.) The judge then had Ms. Gordon brought into court in order to confirm this assumption.

Ms. Gordon testified that as she was leaving the courthouse "a guy walked up beside me and stated that 'you better not find him guilty'." (T2,11.) Instead of complying with the instructions that the jury not discuss the case with anyone and immediately reporting the incident to the court, Ms. Gordon approached one of the regular jurors in the case, repreated the threat to her, and pointed out to her the person who had made the threat. (T2, 11.)

1/ "T" references are to pages of the reporter's trial transcript docketed on September 14, 1976. The numbers 1, 2, and 3 refer to the transcripts of the following proceedings: March 11, 1976; March 22, 23, 24, 25, 1976; and May 11, 1976, respectively. Thus, the reference (T1, 31) is to page 31 of the transcript of proceedings on March 11, 1976.

The court then interviewed this second juror, one Ms. Ferguson, in order to ascertain whether knowledge of the incident and spread even further among the jury members. The second juror revealed that in response to an inquiry by one of the jurors as to Ms. Gordon's absence that morning, she informed two other members of the jury that Ms. Gordon had been approached by someone and that she had advised her to report it. (T2, 16, 17, 18.) This conversation between Ms. Ferguson and the other jurors took place within the jury room with all the jurors present. (T2, 18.) Although Ms. Ferguson could not identify these two jurors by name, she indicated that they both occupied seats in the front row of the jury box.

Faced with the evidence that at least four jurors were aware of the threat, the trial court decided to conduct a voir dire examination of the remaining jurors in order to "ascertain the exact extent of the infestation." (T2, 22.) The trial court conducted a very restricted examination of the remaining jurors, simply asking whether each juror had discussed the case with anyone, whether the juror could continue to serve as an unbiased juror, and, at the request of defense counsel, whether the juror had overheard anyone else discussing the case. In response to the trial court's inquiries, only two of the jurors admitted having heard that one of their members had been approached. (T2, 31, 33.) Significantly, the two jurors who responded affirmatively were seated in

the back, not the front row of the jury box. The first juror testified that there were "ohs and ahs" among the jurors about the incident and that "it was really shocking that it happened," (T2, 31) and the second juror indicated that, while no one had attempted to discuss the case with her, she had "heard a rumor . . . that someone had approached a member of the jury." (T2, 33.)

Defense counsel for the three co-defendants moved for a mistrial, pointing out that the court's general voir dire examination indicated that as many as six jurors, and perhaps more, were aware of the incident and further, that at least two may not have responded honestly to the questions. Thus, counsel argued that the impartiality of the jury was seriously undermined and, hence, defendants' constitutional right to a fair trial was in jeopardy. (T2, 39-43.) Despite these objections, the court denied defense counsel's motions for mistrial. (T2, 42, 43.) Late that day, the trial court heard the Government's motion that Ms. Gordon and Ms. Ferguson be excused from further service in the case, and granted it with respect to Ms. Gordon. (T2, 66-67, 75-76.) At that time the trial court again denied the defendants' motions for mistrial. (T2, 75-76.)

Three days later the jury returned a verdict of guilty on each count charged with respect to each of the defendants. (T2, 395.)

Appellant Waller commenced this appeal in the District of Columbia Court of Appeals to review the judgment and sentence of the Superior Court. On appeal Appellant Waller argued: (1) that a strong presumption against impartiality was raised by the threat to one of the jurors, knowledge of which was disseminated to an undetermined number of jurors, and that the court erred in denying defense motions for a mistrial where the government failed to prove the harmlessness of the unauthorized communication; (2) that Appellant Waller's conviction of first degree felony murder for a homicide that he did not personally commit was illegal because 22 D.C. Code 2401 could not legally or constitutionally support a first degree felony murder conviction on an aider and abettor basis; and (3) that appellant's separate punishment for both felony-murder and for the underlying felony of attempted armed robbery violated the Double Jeopardy provision of the Fifth Amendment.

The Court of Appeals rejected appellant's contentions and, on July 5, 1978 affirmed the Superior Court's judgment and sentence. In its opinion the court concluded that the voir dire examination conducted below was sufficient to rebut the presumption of prejudice arising under the circumstances. The court rejected appellant's contention that §22-2401 D.C. Code was unconstitutionally vague. Finally, the Court rejected appellant's

Double Jeopardy argument, on the grounds that merger was not constitutionally required where distinct societal interests were to be protected by separate statutes and, separate offenses were tried in a unitary prosecution. Rehearing en banc was denied on August 17, 1978.

THE QUESTIONS ARE SUBSTANTIAL

A. Appellant's Right To An Impartial Jury Was Unconstitutionally Compromised By A Threat On A Juror Communicated To An Undetermined Number Of Jurors.

The Sixth Amendment of the United States Constitution provides in relevant part that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."[2/] Courts, in carrying out this mandate have zealously guarded the accused's right to a trial by a jury not contaminated by extrinsic evidence or external pressure. Thus, the constitutional mandate is clear: "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial;" and while "[t]he presumption is not conclusive . . ., the burden rests heavily upon the Government to establish,

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2/ The Sixth Amendment is directly applicable to criminal prosecutions in the District of Columbia. See Callan v. Wilson, 127 U.S. 540 (1888).

after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." Remmer v. United States, 347 U.S. 227, 229 (1954). (Emphasis added.) Accord, Mattox v. United States, 146 U.S. 140, 148-150 (1892).

While appellant concedes that the procedures utilized to ferret out the possibility of prejudice remain flexible and within the trial court's discretion, nevertheless, the examination must be so designed as to elicit sufficient information to sustain a finding of harmlessness: the court ". . . should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." Remmer v. United States, supra at 230. Accord, Ryan v. United States, 89 U.S. App. D.C. 328, 191 F.2d 779, 781 (1951), cert. denied, sub nom, Duncan v. United States, 342 U.S. 928 (1952); Stewart v. United States, 129 U.S. App. D.C. 303, 394 F.2d 778, 780 (1968); and "a trial judge should not hesitate to grant a new trial where there is any significant doubt whether the presumption of prejudice has been overcome." Ryan v. United States, supra at 781. These stringent requirements derived from the mandate of the Sixth Amendment were not met in the instant case.

The threat made to an alternate juror and communicated to an undetermined number of jurors created a

presumption of prejudice[3/] which was not refuted by the trial court's restricted voir dire examination which was neither sufficiently probing to ascertain the extent of the prejudice nor sufficiently thorough to confirm the absence of bias toward the defendants. The court's determination to conduct the voir dire "in the most innocuous manner possible, and not to give [the jury] any information that they don't already have," (T2, 23.) resulted in a situation in which the questions asked of the jurors were insufficiently pointed and precise to elicit complete and responsive answers. As a result, the incident was probed in only very general terms and, with one exception,

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3/ The record shows that an alternate juror, Ms. Annie D. Gordon, was approached as she left the courthouse by an unknown third party who threatened her that a guilty verdict "had better not be returned in this case." (T2, 9, 11-12.) Almost immediately thereafter, Ms. Gordon encountered a fellow juror, Ms. Julia Ferguson, to whom she recounted the incident, pointing out the departing third party. Ms. Ferguson, after hearing Ms. Gordon's story, advised her to return and report the incident to the court. The judge apparently had no knowledge that Ms. Gordon had discussed the incident with another juror until the hearing was reconvened a week later. However, after questioning her just prior to resuming the hearing, the judge remarked: "I had assumed that this had gotten no further than Ms. Gordon; that assumption was incorrect. Now, I want to find out how much further this infestation has spread." (T2,22.)

In that regard, the record again clearly shows that the "infestation" had spread. Ms. Ferguson, the juror with whom Ms. Gordon had contact, did discuss Ms. Gordon's absence with at least two other jurors, explaining that "someone said something [to her] Monday, when we were leaving, and maybe that's the reason." (T2, 17.) Whether more jurors overheard Ms. Ferguson's remarks and whether more was said in conjunction with her explanation remain unanswered, and more importantly, largely unasked questions. The two jurors to whom Ms. Ferguson admitted relating Ms. Gordon's story, were both aware that Ms. Gordon ". . . had been approached." (T2, 31, 33.) It is also clear first, that ". . . everybody was concerned about [Ms. Gordon's

(cont. on next page)

with no opportunity whatsoever for cross-examination of the jurors by Appellant's counsel at trial.[4/] Other than the standard inquiry as to a juror's impartiality, each juror was asked only two questions: first, "Have you had any discussions, at all, with anyone, with respect to anything that may have occurred in this case last Monday?" and second, ". . . have you heard anyone else discuss it?" (T2, 24-38.) The first question plainly did not pointedly probe the juror's knowledge of the specific incident involving Ms. Gordon. The second question was similarly general and, moreover, could be easily denied by any individual who was certain that nobody knew he had overheard the conversations relating to the incident, particularly if that juror sensed, at the moment questioned, some duty to protect, not only himself, but also the offending juror. It will be recalled that all jurors, when seated, had been charged not to discuss anything relating to the case with anyone.

3/ (continued from previous page) absence]" and second, that the explanation given -- presumably that she had been "approached" -- generated "ohs and ahs" and the remark that it was "[r]eally shocking that [the incident] happened." (T2, 31.)

4/ The Judge did afford each counsel an opportunity to examine juror Julia Ferguson. Significantly, it was during examination by counsel for the various defendants that the scope of Ms. Ferguson's knowledge of the incident was learned, as well as the probable number of jurors with whom she had contact. (T2, 16-19.) This fact merely serves to underscore the importance of insuring that there be ". . . full judicial protection of the defendant's right . . . of cross-examination . . ." Turner v. Louisiana, 379 U.S. 466, 473 (1965); Accord, Jordan v. United States, supra; Stewart v. United States, supra.

The trial court's errors of omission are greatly compounded by its further failure to ask follow-up questions where its initial inquiry suggested that a given juror's response indicated a broader knowledge of the incident. Thus, it plainly was necessary for the court to interrogate more fully the jurors who answered that there were "ohs and ahs" in the jury room and there was a "rumor" that a fellow member had been approached. The court instead failed, at that point, to zero in on those responses in order to insure that it accurately had ascertained the number of people who were in fact knowledgeable about the incident.[5/]

The foregoing facts plainly present more than "mere suspicion and surmise" (cf. United States v. Catalano, 231 F.2d 67, 68 (2nd Cir. 1956), quoting from United States v. Sorcey, 151 F.2d 899, 903 (7th Cir. 1945), cert. denied, 327 U.S. 794 (1946). Appellant submits that these factors combined to deny him a fair trial for the presumption of prejudice was not rebutted by the trial court's cursory examination of the jurors or by any evidence submitted by the prosecution, and hence the Government never met its "heavy burden" of showing the harmlessness of the threatening remark made, in effect, to the jury.[6/] Indeed, the government's most compelling argument was not addressed to showing the harmlessness of the incident's impact on the jury, but instead went to the judicial inefficiency and the costs of granting defendants a new trial.[7/] Indeed, the prosecuting attorney admitted that there was a problem, albeit, in his words a "small" one.

Moreover, the prosecuting attorney's contention that bias was purely speculative since two of the jurors could not quote the specific language of the communication to Ms. Gordon, only that she was "approached," ignored the fact that the incident had to covey the impression to at least three jurors that one of their members was being pressured to act perhaps contrary to her free will.[8/]

5/ Significantly, no juror admitted outright discussing the case with anyone, even though three jurors and possibly more did, in fact, discuss Ms. Gordon's absence, due to the threatening communication. For example, Ms. Gray responded negatively to the court's question as to whether she discussed the case with anyone, although a subsequent response revealed that she had heard that "the girl . . . had been approached." (T2, 31.) Again, when queried as to whether there was further discussion about the incident, Ms. Gray responded "no, ohs and ahs and that's all." (T2, 31.) Perhaps the term "discussed" may have implied a detailed conversation to the jurors since Ms. Godsey indicated that she had heard a "rumor" concerning the incident, clearly pointing to evidence of discussion about the incident among the jurors.

6/ See T2, 41-42.

7/ Indeed, it is important to note that the court itself never concluded that the incident was harmless to the defendants. Instead, based on a superficial and restricted voir dire, it concluded that the "extent of the problem is minor, small, and of limited significance, if any." This was simply insufficient to overcome the presumption of prejudice.

8/ We note the Government's reliance on the fact that the trial court did inquire of each juror whether his or her impartiality had been adversely affected and received negative answers from each juror. However, as the court noted in Ryan v. United States, supra at 781, the judge's conclusions [as to the impartiality of a juror] may not

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(T2, 41-42.) As the court so aptly recognized in Stone v. United States:

> Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained . . . . The whole jury was exposed to, and actually encountered an outside disturbance. Each, except the one approached, was interrogated in his presence about outside influences and while no inquiry can be made as to what occurred while the jury was deliberating, it takes no more than an ordinary observation of human nature to realize the suspicion in the minds of the jurors that something had happened extraneously in the course of the trial to influence their deliberations. 113 F.2d 70, 77 (6th Cir. 1940).

Although the court later excused the alternate juror (T2, 75), no action was taken with respect to the juror in whom Ms. Gordon originally confided and who was sufficiently indiscrete to advise other members of the panel of the incident. Thus, the jury which convicted Appellant Waller was comprised of at least three and possibly five persons who had knowledge of the incident and were thereby conceivably biased in their deliberation. This probability is simply acceptable, for as the court pointed out in Parker v. Gladden, supra at 366, a criminal defendant "is entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors."

8/ (continued from previous page) rest entirely upon the testimony of the juror, because that alone is too uncertain a bias for resolving the issue of prejudice," citing United States v. Rakes, 74 F. Supp. 645 (D.C. Va. 1947).

The Sixth Amendment mandate of impartiality is regarded as so important that even where the evidence for conviction is deemed legally sufficient, "a [defendant] is nevertheless entitled to a trial which [is] fair and free from pretrial error. State v. Jackson, supra at 7. For, ". . . the sound administration of justice dictates that the means as well as the ends be just; [thus], where serious trial error has determined the proceeding, there must be reversal without regard to [the court's] view as to guilt." Id. This is so because "[i]n any sound judicial system it is essential not only that justice be done but also that it appear to be done." Id., 203 A.2d at 8.[9/] The requirement of trial by an impartial jury is not solely for the protection of the criminal defendant but should be adhered to because of its importance "as one of the most vital elements in the administration of justice." Stone v. United States, supra at 77.

The constitutional issues raised by the foregoing facts were presented in a timely and substantive manner to the trial court in defense counsels' motions for a new trial[10/] and in appellant's brief to the District of Columbia Court of Appeals.[11/]

9/ See also United States v. Rattenni, 480 F.2d 195, 198 (2d Cir. 1973). ("In requiring the retrial of this count . . . we do not close our eyes to the weighty evidence presented against appellant which makes us reluctant to reverse. Nonetheless, the crucial importance of protecting the integrity of the trial process from such intrusions as occurred in this case mandates that we not permit the conviction to stand.")

10/ T2, 40-43.

11/ Brief for Appellant filed April 4, 1977 at 1-12 (hereinafter App. Br.).

B. Appellant's Conviction Of First Degree Felony Was Improper Because 22 D.C. Code 2401 Cannot Legally Or Constitutionally Support A First Degree Murder Conviction On An Aider And Abettor Basis.

The Court charged the jury that Appellant Waller could be convicted of First Degree Felony Murder for a homicide he did not personally commit, on an aider and abettor basis (T2, 358-59). And the jury so convicted Appellant. 22 D.C. Code 2401 is a very narrowly drawn felony-murder statute which states, in pertinenet part, that:

> Whoever . . . without purpose so to do kills another in perpetrating . . . robbery . . . is guilty of murder in the first degree.

The statute, which like all criminal statutes must be strictly construed against the prosecution and in favor of Appellant, Kirchmand v. United States, 256 U.S. 363 (1920); United States v. Lacher, 134 U.S. 624 (1890); Kordel v. United States, 335 U.S. 345 (1948); CLARK AND MARSHALL, CRIMES 46-48 (7th ed. 1967), transfers or imputes the requisite intent for first degree murder solely to the actual killer -- "Whoever . . . kills" -- in perpetrating the robbery. It does not purport to transfer or impute first degree murder intent or any other criminal intent to the other participants in the underlying robbery.

Concededly, through a common law agency theory, as embraced by the aider and abettor principle of 22 D.C. Code 105, Appellant might, in the proper circumstances,

be held criminally responsible for a homicide actually committed by one of his accomplices during the course of, and in furtherance of the common purpose of, the underlying robbery. However, the degree of homicide for which Appellant could be held criminally liable would be solely manslaughter, since he would lack the required intent for first or second degree murder. 22 D.C. Code 2401 does not, in any plain reading, impute or transfer such requisite criminal intent, as a matter of law, to anyone other than the actual killer. And neither does 22 D.C. Code 105. Even if the transferred or imputed criminal intent satisfying the first degree murder intent requirement pursuant to the felony-murder statute is deemed to be the intent to commit the underlying robbery, see, e.g., United States ex rel. Wilson v. Essex City, Court, 406 F. Supp. 991, 1002, n.5 (D.N.J. 1976), 22 D.C. Code 2401 only transfers such underlying intent as to the actual killer, not with regard to other participants in the underlying felony. While the law of agency -- by virtue of the aiding and abetting principles of 22 D.C. Code 105 or otherwise -- can make Appellant criminally responsible for the acts of his agents, accomplices or principals in the robbery -- including the act of the killing which occurred, i.e., homicide -- nothing in the doctrines of agency or aiding and abetting would support imputation of the homicide act to the nonkiller at the heightened level of first or second degree murder rather than manslaughter.

In effect, 22 D.C. Code 2401 construed in conjunction with 22 D.C. Code 105 represents a glaring departure from the traditional subjective test of criminal liability. At issue is whether appellant should be convicted of first degree murder for causing a death which he neither perpetrated nor intended to cause nor foresaw simply, because he was a participant in the commission of a felony without clear and direct statutory specificity and without the opportunity for any inquiry into intent and therefore mitigation.

The interpretation of 22 D.C. Code 2401, coupled with the aiding and abetting principle of 22 D.C. Code 105, as employed by the Court in charging the jury respecting Appellant, violated Appellant's rights under both the Fifth and Eighth Amendments to the United States Constitution. The due process clause of the Fifth Amendment requires that criminal statutes be specific. See, e.g., Screws v. United States, 325 U.S. 91 (1945). As applied to Appellant in the case at bar 22 D.C. Code 2401 is void for vagueness. The Eighth Amendment proscribes cruel and unusual punishments. The sentencing of Appellant to 20 years to life imprisonment for an alleged violation of 22 D.C. Code 2401 in the circumstances of this case, is a punishment of excessive length and severity that violates the Eighth Amendment. Cf. Weems v. United States, 217 U.S. 349 (1910); Furman v. Georgia, 408 U.S. 238, reh. denied, 409 U.S. 902 (1972).

Appellant initially raised this statutory challenge on appeal and the District of Columbia Court of Appeals upheld the constitutionality of the statutes as applied to appellant.[12/]

C. Appellant's Simultaneous Conviction And Separate Punishment For Both Felony-Murder And For The Underlying Felony of Attempted Armed Robbery violated The Double Jeopardy Clause Of The Fifth Amendment.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The U.S. Supreme Court has affirmed that the Double Jeopardy Clause protects not only against multiple prosecutions for the same offense after conviction or acquittal, but also against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969). Appellant Waller was sentenced to twenty years to life on the felony-murder conviction and three to ten years on the attempted armed robber conviction. The sentences were concurrent. Such simultaneous conviction and separate, albeit concurrent, sentencing for felony-murder and the underlying felony of attempted armed robbery violate the Double Jeopardy provision of the Constitution. In Brown v. Ohio, ___ U.S. ___ (1977).

12/ See App. Br. 13-15 and slip op. at 10-12.

this Court reaffirmed the test enunciated in Blockburger v. United States, 284 U.S. 299 (1932) as the appropriate standard for ascertaining whether legal offense categories are sufficiently distinct to permit the imposition of cumulative punishment.[13/] Applying the Blockberger test, this Court concluded that a lesser included offense merged with the greater offense, and, hence, punishment for both offenses fell within the purview of the Double Jeopardy Clause:

> As is invariable true of a greater and lesster included offense, the lesser offense . . . requires no proof beyond that which is required for conviction of the greater . . . . the greater offense is therefore, by definition the same for purposes of double jeopardy as any lesser offense included in it. At 4699.

The Court concluded that "whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense," supra at 4699.[14/]

13/ That test emphasized the elements of the offense, providing:

> the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . . 284 U.S. at 304.

14/ Cf. Harris v. Oklahoma, ___ U.S. ___ (1977) (per curiam), 21 Cr L 3211 (June 29, 1977).

The issue presented in this case is whether felony murder and the underlying felony upon which the murder conviction was based are to be regarded as the same offense under these principles. D.C. Code §22-2401, which defines the offense of first degree murder, requires either a showing of deliberate intent to take life or proof that the murder was committed in perpetration of certain offenses, in the instant case, attempted armed robbery. Thus, a conviction for first-degree murder, to be valid, requires proof of premeditation or malice, except that where the conviction is predicated on the commission of a felony, by proving every element of the underlying felony, the element of malice necessary for first-degree murder is established.

This line of analysis led the Maryland Court of Appeals in Newton v. State, ___Md.___, 373 A.2d 362 (1977) to reverse its prior decisions in this area and to hold that separate convictions and sentences for felony murder and the underlying felony constituted double punishment for the same offense in violation of the Fifth Amendment's Double Jeopardy Clause. The Maryland Court reasoned that:

> . . . to secure a conviction for first degree murder under the felony murder doctrine, the State is required to prove the underlying felony and the death occurring in the perpetration of the felony. The felony is an essential ingredient of the murder conviction. The only additional fact necessary to secure the first degree murder conviction, which is not necessary to secure a conviction for the

> underlying felony, is proof of the death. The evidence required to secure a first degree murder conviction is, absent the proof of death, the same evidence required to establish the underlying felony. Therefore, as only one offense requires proof of a fact which the other does not, under the required evidence test the underlying felony and the murder merge. 373 A.2d at 267.

In the present case, appellant submits that the attempted armed robbery charge was a necessary element of first-degree felony murder, and became a lesser included offense in the greater felony murder charge. Consequently his simultaneous convictions and separate sentencing for both offenses contravened the Double Jeopardy Clause of the Fifth Amendment. Accordingly the attempted armed robbery conviction must be reversed.[15/]

This conclusion is in accord with that reached by several other jurisdictions which, applying the Blockberger test, have held that the underlying felony and the felony murder merge. State ex rel. Wilkberg v. Henderson, 292 So.2d 505 (La. 1974); People v. Anderson, 62 Mich. App. 475, 233 N.W.2d 620 (1975); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Thomas, 114 N.J. Super. 360, 276 A.2d 391 (1971); Ex Parte Jewel, 535 S.W.2d 362 (Tex. Cr. App. 1976); Ronzani v. State, 24 Wis.2d 512, 129 N.W.2d 143(1964).

15/ The fact that the sentences for the two offenses are to be served concurrently is no bar to consideration of the double jeopardy issue, for as the Supreme Court recognized in Benton v. Maryland, 395 U.S. 784, 790, "'most criminal convictions do in fact entail adverse collateral legal consequences,' [and] the mere possibility of such collateral consequences [is] enough to give the case the 'impact of actuality' . . . necessary to make it a justiciable case or controversy." (Citing Sibron v. New York, 392 U.S. 40, 55 (1968).) See also Comment, Twice in Jeopardy, 75 YALE L.J. 262, n.121 (1965).

II. REASONS FOR GRANTING THE APPEAL

The District of Columbia Court of Appeals' refusal to reverse the challenged convictions for a new trial is in direct conflict with this Court's decisions construing the parameters of the Sixth Amendment's mandate of an impartial jury in all criminal prosecutions and the obligations of the Government where there is evidence of unauthorized communications--especially with respect to the verdict--with the jury. Furthermore, the restricted and limited voir dire examination conducted by the trial court is inconsistent with this Court's well-settled directive that evidence of the harmlessness of the unauthorized communication be made to appear on the record. Remmer v. United States, supra at 229, Accord, Mattox v. United States, supra at 148-150, Ryan v. United States, 89 U.S. App. D.C. 328, 191 F.2d 779, 781 (1951), cert. denied, sub. nom. Duncan v. United States, 342 U.S. 928 (1952), Stewart v. United States, 129 U.S. App. D.C. 303, 394 F.2d 778, 780 (1968).

At issue is whether simply conducting a voir dire examination is sufficient to rebut the presumption of bias and to avoid the stringent constitutional requirements of the Sixth Amendment. The court in its opinion responded to Appellant Waller's contentions in the following manner:

First, that more specific questioning created the risk of enlarging the number of jurors aware of the threat; second, that the jurors said they could continue to serve impartially; and, third, that the incident sub judice was innocuous compared with more bizzare occurrences in other cases where mistrials were found to be unwarranted. Waller v. United States, slip op. at 8.

Appellant Waller submits that these reasons are insufficient bases for rebutting the presumption of prejudice on the facts of the instant case. Granted there may be risks in providing too much information to jurors and further tainting the panel, but the purpose of an inquiry is not simply for form, but to put on the record proof of impartiality. The fear of further dissemination did not excuse the failure to probe further those jurors who spoke of rumors and other generalized reactions to the incident. And, the unresolved state of the record as to the number of cognizant jurors raised questions as to the credibility of the jurors' response to the question whether they discussed the case with anyone and also to the credibility of their affirmations of impartiality. Finally, the court's reliance on the comparative seriousness of the threat here and the incidents in other cases warrants review. In those cases,

on the record, there was and could be no misunderstanding of either what the situation was or that a juror's declaration of impartiality was responsive to the incident. (Indeed, in some cases cautionary instructions were given.) What we have here in this case is a record full of questions on the issue, and, for this reason, reversible error was committed when the motions for retrial were denied and review is here sought.

Secondly, Appellant seeks review of the question of whether his conviction for first degree felony murder contravened Appellant's rights under the Fifth and Eighth Amendments to the Constitution where his conviction was premised on substitution of the mens rea of a lesser offense for the mens rea of a greater offense in the absence of a specifically drafted statute and by a catch-all aiding and abetting statute. Thus appellant challenges the over-breadth of the joint construction of the challenged statutes as applied to him without the opportunity for mitigation.

Finally, Appellant respectfully urges this Court to review the court of appeals rejection of his contention that his simultaneous prosecution and separate punishment for both felony-murder and for the underlying felony violated the Double Jeopardy clause of the Fifth Amendment.

The court marshalled three basic arguments in rejecting appellant's contentions. First, citing Blango v. United States, D.C. App. 373 A.2d 885, 888 (1977), the court submitted that "the societal interests served by each statute are separate and distinct", thus justifying separate punishments. Waller, at 1618. Second, following the reasoning of the first argument, the Court concluded that the underlying felony is not a lesser included offense. Finally, the court concluded that in any event because "the case at bar involves a unitary prosecution [it] present[s] no Double Jeopardy considerations." At 1621. We submit that in relying on these reasons the court misapprehended the controlling principles of Brown and of the Double Jeopardy clause.

Appellant submits that the decision in Brown, supra, brought the doctrine of merger of lesser offenses within the ambit of the constitutional protections of the Double Jeopardy clause. Whatever the prior theories justifying nonmerger on the ground of separate societal interests, the decision in Brown mandated that they be re-examined against a constitutional imperative. This the court failed to do. Moreover, the court's argument that because appellant was sentenced in a unitary prosecution, no Double Jeopardy

considerations pertained should be rejected. "The U.S. Supreme Court has affirmed that the Double Jeopardy clause protects not only against multiple prosecutions for the same offense after conviction or acquittal, but also against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969)". Accord. Brown v. Ohio, supra.

Finally, this issue warrants review because the court's denial of Appellant's Double Jeopardy claims is in direct conflict with decisions reached in other jurisdictions. Newton v. State, 373 A. 2d 362 (1977); State ex rel. Wilkberg v. Henderson, 292 So.2d 505 (La. 1974); People v. Anderson, 62 Mich. App. 475, 233 N.W.2d 620 (1975); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Thomas, 114 N.J. Super. 360, 276 A.2d 391 (1971); Ex Parte Jewel, 535 S.W.2d 362 (Tex. Cr. App. 1976); Ronzani v. State, 24 Wis.2d 512, 129 N.W.2d 143 (1964).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court grant this appeal.

Respectfully submitted,

Wilhelmina Reuben Cooke

Wilhelmina Reuben Cooke
(Appointed by the District of
Columbia Court of Appeals)

December 21, 1978

APPENDIX A

Frederick J. Sullivan, appointed by this court, for appellant Gaskins.

Peter Chatilovicz, appointed by this court for appellant Patterson, adopted the briefs of appellant Waller, but did not participate in argument.

E. Thomas Roberts, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, and *John A. Terry*, Assistant United States Attorney, were on the brief, for appellee. *Jonathan Lash*, Assistant United States Attorney, also entered an appearance for appellee.

Before KELLY, KERN and YEAGLEY, *Associate Judges*.

YEAGLEY, *Associate Judge*: On March 25, 1976, following a two-week jury trial, appellants were each found guilty of felony murder, first-degree burglary while armed, attempted armed robbery, three counts of armed robbery, three counts of assault with intent to commit robbery while armed, and assault with a dangerous weapon. Appellant Waller alone was found guilty of carrying a pistol without a license.[1]

The events which resulted in these convictions took place on February 18, 1975 in the vicinity of 14th and

[1] Appellant Gaskins was sentenced to 20 years to life for felony murder, and received consecutive sentences of 10 years to life and 3 to 10 years for first-degree burglary while armed and assault with a dangerous weapon, respectively. He received concurrent maximum sentences for the remaining counts. Appellants Waller and Patterson were each sentenced to 20 years to life for felony murder and a consecutive 20 years to life for first-degree burglary while armed. They each received concurrent maximum sentences for the remaining counts.

Girard Streets, N.W. At approximately 2 a.m., appellants and Channeta Patterson [2] encountered Robert Reid, with whom they were not acquainted, and asked him where they could purchase some drugs. Reid told appellant Patterson that he would make a purchase for them and instructed appellant Patterson and his companions to await his return in their car across the street. Instead, appellants waited until Reid had entered a nearby building, and then alighted from the car. Appellants armed themselves—appellant Patterson with a sawed-off shotgun, appellant Waller with a pistol, and appellant Gaskins with a knife. The men entered the building and forced their way into the apartment to which Reid had gone. When they announced a robbery, occupant James Granby started to run. Appellant Waller shot at him and missed as Granby locked himself in the bathroom. Appellant Patterson ordered Reid to bring Granby to him. Reid complied. Patterson demanded narcotics from Granby, and when the latter hesitated, hit him on the head with the butt end of his shotgun. As Granby lay on the floor, semiconscious, Patterson put the shotgun to his chest and killed him.

Appellants rounded up the remaining eight occupants of the apartment, took their money, and departed to the car in which Patterson's wife, Channeta, was waiting.

Appellant Patterson was arrested five weeks later, following a photo identification of him. He and Channeta Patterson gave statements admitting their involvement in the offenses and identifying appellants Waller and Gaskins as their coparticipants. Channeta Patterson so testified at trial. Her testimony was corroborated by testi-

[2] Defendant Channeta Patterson, appellant Patterson's wife, pleaded guilty to armed robbery and appeared as a government witness at appellants' trial.

mony of five of the victims, at least one of whom identified each appellant. Only appellant Gaskins denied his involvement; his denial is restated here and is addressed in section V, *infra*.

I

Appellants Waller and Gaskins contend [3] that the trial court committed reversible error in denying their motions for a mistrial because the government failed to rebut the presumption of prejudice arising from an unauthorized communication with a juror. They further contend that the voir dire examination of jurors conducted by the court in this connection was insufficient to ascertain the extent to which they were prejudiced by the unauthorized communication.

On March 15, 1976, following four days of trial, it became necessary to recess proceedings for one week. As the jurors were leaving the courthouse, a man approached alternate juror Annie Gordon and said, "you had better not find him guilty." Ms. Gordon told juror Julia Ferguson what had happened, and then immediately reported the incident to the trial court.

When trial reconvened the following Monday, the trial court segregated Ms. Gordon from the other jurors and informed all counsel of the incident. Ms. Ferguson was questioned and revealed that when Ms. Gordon had failed to appear in the jury room that morning, she told two other jurors that "somebody had said something to [Ms. Gordon]." Ms. Ferguson said that she had not disclosed to her cojurors the nature of the statement. It was confirmed that at least two other jurors had indeed become

[3] Appellant Patterson has received this court's permission to join in this contention, and in the argument addressed in section III, *infra*.

aware that Ms. Gordon had been approached. The trial court proceeded to voir dire the entire panel one at a time, and asked each juror three questions:

> (1) Have you discussed this case with anyone, or has anyone discussed this case with you?
>
> (2) Have you heard anyone else discuss it?
>
> (3) Do you feel, at this time . . . that you may continue to serve as a fair and impartial juror in this case, without any prejudice or bias, or without any fear?

None of the jurors expressed doubt that they could continue serving impartially. The trial court excused Ms. Gordon because she had to be questioned as part of a police department investigation of the threat, and made the following findings:

> Well, based on my voir dire of each and every member of this jury, it's my determination, at this time, that the extent of the problem is minor, and small, and of limited significance, if any. Neither the juror to whom this remark was addressed, nor anyone that she has come in contact with, has placed undue emphasis on the remark. Nor, has it substantially affected this juror, or anyone to whom she has spoken.
>
> The nature of the problem, otherwise, is speculative, at best, in terms of what was said, by whom, under what circumstances, and when. I found no occasion on the part of any member of the jury, that they knew precisely, or had a distinct and definite understanding of what was done, or what was said, or by whom, or when, or under what circumstances.

[1610]

> Further, it's my finding, based upon each and every juror's answers to my questions, and my ability to see and view their demeanor, and I find, at this time, that each and every one of those jurors, including the lady to whom that remark was apparently addressed, is able and willing to continue in this case, as a fair and impartial juror. Without any prejudice or without any bias, and without any fear.
>
> And so, on that basis, the motion for mistrial, with respect to each and every one of these defendants, will be denied, at this time.

It is well settled that

> [i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about a matter pending before the jury is . . . deemed presumptively prejudicial . . . . The . . . burden rests heavily upon the government to establish . . . that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229 (1954); *accord Mattox v. United States*, 146 U.S. 140 (1892); *United States v. Burke*, 496 F.2d 373 (5th Cir.), *cert. denied*, 419 U.S. 966 (1974). Where an unauthorized communication with one or more members of the jury is brought to the trial court's attention during trial, and the presumption of prejudice to the defendant is not rebutted, the trial court must declare a mistrial. *Mattox v. United States, supra; United States v. Evans*, 542 F.2d 805 (10th Cir. 1976), *cert. denied*, 429 U.S. 1051 (1977); *United States v. Burke, supra; Ryan v. United States*, 89 U.S.App.D.C. 328, 191 F.2d 779 (1951), *cert. denied*, 342 U.S. 928 (1952).

[1611]

At the same time, appellate courts have long reviewed such trial court determinations by reference to whether discretion was abused, *Hammond v. United States*, D.C. App., 345 A.2d 140 (1975), and have recognized that "[t]he question of prejudice [is] one about which [the trial court is] especially competent to render a sound opinion." *Ryan v. United States*, *supra* at 331, 191 F.2d at 782. In examining the soundness of the trial court's opinion, appellate courts have considered particularly important the inquiry conducted by the trial court on the question of prejudice. That was our basis for affirming the trial court's denial of appellant's mistrial motion in *Hammond v. United States*, *supra*. There, appellant's father appeared in court inebriated, and was escorted by a marshal from the courthouse. Appellant then engaged the marshal in a shouting match, and was physically removed from the courtroom. The jury observed this. The trial court thereafter called the jurors to the bench individually to determine if they could reach a fair verdict, and, satisfied with their affirmative replies, permitted the trial to continue.

In *United States v. Evans*, *supra*, a series of bizarre incidents triggered the necessity for the trial court's inquiry of the jury. First, a juror received a letter signed in the name of appellant. Then, a bomb threat was received at the courthouse, of which the jury became aware. Finally, a defense witness assaulted a juror in the jury box. Repeated motions for mistrial were denied; the denials were affirmed on appeal. "The jury was questioned extensively about the effect of the incidents. They repeatedly responded it would have no effect on their impartiality." *Id.* at 815.

Ryan v. United States, *supra*, involved a motion for a new trial raised because of conversations which had taken

place between the prosecutor and several jurors during a recess. In affirming denial of a new trial motion, the court noted that "[t]he searching inquiry conducted by the trial judge for evidence of bias or prejudice gives adequate support to his negative conclusion on this question of partiality." *Id.* at 332, 191 F.2d at 783.

In the instant case, the trial court asked the members of the jury individually whether they could continue to serve impartially. The three questions did not specifically refer to the incident involving Ms. Gordon because the trial court properly did not want to risk tainting those jurors who remained unaware that one of their colleagues had been approached, or who had heard rumors but possessed no specific information. All members of the jury, those aware and unaware, stated unequivocally that they could continue to serve impartially. We observe that the incident which occasioned inquiry in the instant case was innocuous compared to those found not worthy of mistrial in *Hammond v. United States*, *supra*, and *United States v. Evans*, *supra*, and we accord some significance to the fact that the unauthorized communication here did not introduce inadmissible evidence to the jury. *See Mattox v. United States*, *supra*; *United States v. Rattenni*, 480 F.2d 195 (2d Cir. 1973).*

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* We do not, however, agree with the government's assertion that the weight of the evidence against appellants should be taken into account in determining whether the unauthorized communication should have resulted in a mistrial. *See United States v. Rattenni*, *supra* at 198. Nor are we persuaded by the government's assertion at oral argument that the considerable time and resources spent in connection with this case justified denial of appellants' mistrial motions. Our sole consideration is "the crucial importance of protecting the integrity of the trial process from [unauthorized] intrusions." *Id.*

Finally, we repeat the court's observation in *Klose v. United States*, 49 F.2d 177, 181 (8th Cir. 1931):

> It is the duty of the trial judge to maintain the integrity of trials by jury, and if it appears at any stage of the trial before verdict that misconduct of any juror or any other person has tainted the panel . . . the trial should be stopped and a mistrial granted. Yet, it does not follow that a mistrial should be granted whenever any evilly disposed person in no way connected with the parties, attempts to make improper remarks or advances to a juror . . . . Such a rule might preclude bringing any desperate offender to justice. [Citations omitted.]

We hold that the voir dire examination conducted below sufficed to ascertain the extent of prejudice flowing from the unauthorized communication, and that the responses thereto rebutted the presumption of prejudice arising under such circumstances. The trial court accordingly did not abuse its discretion in denying appellants' motions for a mistrial.[5]

[5] Cases on which appellants primarily rely are factually distinguishable from the instant case. In *Mattox v. United States*, *supra*, reversal was based on an evidentiary ground and not because petitioner's new trial motion had been denied. The Court observed, however, that it would have reversed for improper denial of the new trial motion because the trial court had refused to consider affidavits of two jurors that the bailiff had made prejudicial remarks during jury deliberations, and that a newspaper commenting on the case was brought into the jury room. In *Remmer v. United States*, *supra*, the judge was informed by a juror that an unnamed person had attempted to bribe him. Remand for consideration of petitioner's previously denied new trial motion was based on the trial court's failure to inform the petitioner that a juror had been approached, and failure to conduct a hearing on the matter.

II

Appellant Waller contends that his conviction of first-degree felony murder was improper because D.C. Code 1973, § 22-2401 * cannot legally support the first-degree felony murder conviction of an aider and abettor. He further contends that, insofar as § 22-2401 may be read to permit such a conviction, it is unconstitutionally vague.

Appellant Waller does not question the sufficiency of evidence that he aided and abetted the armed robbery committed by appellant Patterson. He recognizes that D.C. Code 1973, § 22-105 holds an aider and abettor responsible as a principal for all acts committed in furtherance of or which are the natural and probable consequences of the perpetration of a felony. *Harris v. United States*, D.C.App., 377 A.2d 34 (1977); *In re D.M.R.*, D.C.App., 373 A.2d 235 (1977). Appellant argues, in effect, that to convict an aider and abettor of first-degree felony murder, the government must prove two separate intents: first, intent to commit the underlying felony, and second, intent to commit the homicide.

In *United States v. Branic*, 162 U.S.App.D.C. 10, 495 F.2d 1066 (1974), the court listed the two elements requisite for conviction of felony murder. First, the defendant or an accomplice must have inflicted injury on the decedent from which he died. Second, the injury must have been inflicted in perpetration of a specified felony. No distinction was made between principals and aiders and abettors for purposes of felony murder liability. Only intent to commit the underlying felony need

* Section 22-2401 states in pertinent part:

> Whoever . . . without purpose to do so kills another in perpetrating . . . robbery . . . is guilty of murder in the first degree.

be proved. Similarly, in *United States v. Heinlein*, 160 U.S.App.D.C. 157, 167, 490 F.2d 725, 735 (1973), the court observed:

> Accomplices . . . *are exposed to first degree murder accountability by reason of the aiding and abetting statute.* It is true that exposure does not depend upon proof of an intent to kill on the part of the accomplice; that intent is supplied by the fact of participation in the felony giving rise to the killing. [Emphasis added.]

These cases are fatal to appellant Waller's argument; indeed, he offers no authority in opposition. With respect to appellant Waller's assertion that § 22-2401 is unconstitutionally vague, we reiterate our discussion in *Leiss v. United States*, D.C.App., 364 A.2d 803, 806-07 (1976), in which we rejected the same argument raised in connection with D.C. Code 1973, § 22-3102, the unlawful entry statute:

> Moreover, the statute is not subject to the criticism that its prohibitions are phrased in such imprecise language as to be beyond the comprehension of those seeking to conform their behavior to its mandate. The type of conduct subject to its sanctions is clearly identified in words of common understanding, with little room for misinterpretation or conjecture. With respect to this aspect of appellant's claim of vagueness, we note the Supreme Court's views as expressed in *Colton v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972):
>
> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing

> criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

In the case at bar, appellant Waller cannot realistically claim to have been unaware that his conduct could result in one of the sanctions which was ultimately imposed upon him: conviction for first-degree murder. A reading of § 22-2401 in conjunction with § 22-105 reasonably compels that conclusion. Relevant case law amplifies the point. His conviction for felony murder is affirmed.[7]

III

Appellant Waller contends that the Double Jeopardy Clause prohibits his simultaneous prosecution and separate punishment for both felony murder and for the underlying felony of attempted armed robbery.[8] He argues that the underlying felony merges into the felony murder conviction.

Merger of two offenses is ordinarily appropriate when the lesser offense consists entirely of some but not all of the elements of the greater offense. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Hall v. United States*, D.C.App., 343 A.2d 35, 38-39 (1975). Thus, for

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[7] We reject as frivolous appellant Waller's contention that his 20 year to life sentence for felony murder is cruel and unusual punishment. *See Dobbert v. Florida*, 432 U.S. 282 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976).

[8] It is immaterial to this analysis that appellant Waller was sentenced concurrently for conviction of the underlying felony. If this conviction is founded in error, we are bound to reverse, in light of potential collateral consequences stemming from the conviction. *Benton v. Maryland*, 395 U.S. 184 (1969).

example, assault merges into assault with a dangerous weapon, and assault with a dangerous weapon merges into armed robbery. *See Bates v. United States*, D.C. App., 327 A.2d 542 (1974); *Taylor v. United States*, D.C. App., 324 A.2d 683 (1974); *Quick v. United States*, D.C. App., 316 A.2d 875 (1974).

In determining whether merger is appropriate, this court has not only analyzed the language of the statutes involved and the wording of the indictment, but has looked also to the societal interests protected by the statutes under consideration. *Hall v. United States, supra*;* *cf. Williams v. Oklahoma*, 358 U.S. 576 (1959).

Shortly after our decision in *Hall*, we affirmed separate convictions for felony murder (burglary) and first-degree burglary, holding that "the societal interests served by each statute are separate and distinct." *Blango v. United States*, D.C.App., 373 A.2d 885, 888 (1977). In further explaining this rationale, we observed subsequently that

* In *Hall*, we held that simple assault was not a lesser included offense of obstruction of justice by assaulting a witness, and that conviction of the former did not merge into conviction of the latter. We noted that

> the interests protected by the two statutes are widely disparate. The crime of obstructing justice is societal in that it is intended to insulate the criminal justice system from corruption whereas the crime of simple assault is intended to protect the physical security of individual citizens. [*Id.* at 39.]

See United States v. Butler, 149 U.S.App.D.C. 300, 462 F.2d 1195 (1972) (consecutive sentences for murder, housebreaking, larceny upheld); and *Irby v. United States*, 129 U.S. App.D.C. 17, 390 F.2d 482 (1967) (en banc) (consecutive sentences for housebreaking and robbery upheld), in both of which the United States Court of Appeals noted the different societal interests protected by each statute.

"the societal interest served by the burglary statute, protection of occupied dwellings, is separate and distinct from that of the murder statute, security and value of the person." *Harris v. United States, supra* at 38.

We find persuasive the analysis of then Chief Judge Bazelon in his statement as to why he would grant rehearing en banc in *United States v. Greene*, 160 U.S. App.D.C. 21, 489 F.2d 1145 (1973):

> At common law, homicides were divided into two categories, murder and manslaughter, with murder requiring a showing of "malice." Any homicide committed in the course of a felony was considered murder because malice could be implied from the commission of the felony. When homicides were further subdivided by statute into first degree murder, second degree murder and manslaughter, the doctrine of felony murder was preserved, and the underlying felony was viewed as providing the "premeditation" and "deliberation" otherwise required for first degree murder; as well as malice, where necessary.
>
> Given this rationale for the felony murder doctrine, it strains credulity to hold that the underlying felony merges into the felony murder. The statute proscribing the underlying felony—robbery, for example—is designed to protect a wholly different societal interest from the felony murder statute, which is intended to protect against homicide.
>
> The underlying felony is an essential element of felony murder only because without it the homicide might be second degree murder or manslaughter. [*Id.* at 44-45, 489 F.2d at 1168-69 (footnotes omitted).]

We believe that while the underlying felony, here attempted armed robbery, is an element of felony murder, its principal function is as an intent divining mechanism. It permits the jury to infer the state of mind requisite for conviction of murder in the first degree. As such, it is not a lesser included offense of felony murder. We cannot, moreover, accept a construction of law the effect of which would be to render the underlying felony a nullity any time death occurred during its perpetration. Congress enacted two separate statutes to protect two separate societal interests, and acceptance of appellant Waller's contention would comport with neither congressional intent nor common sense.

Finally, appellant Waller's reliance on *Brown v. Ohio*, 432 U.S. 161 (1977), is misplaced. There, the Court restated the well settled lesser included offense rule that where the same act violates two statutory provisions, the test to be applied to determine whether there are two offenses is whether each provision requires proof of a fact which the other does not. *Id.* at 166, *citing Blockburger v. United States*, 284 U.S. 299, 304 (1932). In the case at bar, we are not presented with one act violating two distinct statutory provisions. We instead examine two acts—attempted armed robbery, and homicide—and the only connection between them is that commission of the former permits a finding of intent requisite to convict of the latter in the first degree.[10] Appellant Waller's con-

[10] Nor does appellant Waller find support in *Harris v. Oklahoma*, 97 S. Ct. 2912 (1977). There, Harris was convicted of felony murder (robbery). Thereafter, the state sought and obtained Harris' conviction for the underlying felony. The Supreme Court reversed the second conviction, and observed:

> Where, as here, conviction for a greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime *after* conviction for the greater one. [*Id.* at 2913 (emphasis added).]

Harris turned on Double Jeopardy principles; petitioner had already been put in jeopardy for the robbery he had committed, and the state could not constitutionally do so again in a subsequent proceeding. The case at bar involves a unitary prosecution, presenting no Double Jeopardy considerations. We find the cases distinguishable on this basis.

viction and concurrent sentence for attempted armed robbery is affirmed.[11]

IV

Appellant Gaskins contends that the trial court abused its discretion in limiting his cross-examination of three government identification witnesses.

On direct examination, witness Robert Reid identified appellants Waller and Patterson as two of the perpetrators. He was asked nothing with respect to the identity of the third perpetrator. On cross-examination, appellant Gaskins sought to introduce into evidence a description of the third assailant which Reid had given police, in order to show that the third, unnamed individual identified by Reid was several inches shorter than appellant Gaskins. The government did not object. Instead, the trial court intervened, sua sponte, to prohibit cross-examination on

[11] We similarly reject appellant Waller's assignment of error to the trial court's alleged failure to specifically instruct the jury that intent is an essential element of assault, where one is charged with assault with intent to commit robbery while armed. He failed to object below, thus resolution of this contention is governed by the plain error standard. *Watts v. United States*, D.C.App., 362 A.2d 706 (1976) (en banc). Examination of the court's instruction, which mirrored District of Columbia Bar Association, Criminal Jury Instructions for the District of Columbia, No. 4.13 (2d ed. 1972), leads us to conclude that no error was committed, plain or otherwise.

this point, expressing the view that witness Reid's description of the unnamed third assailant bore no relation to his testimony on direct examination.

The same thing happened with respect to government witnesses Albert Williams and Percy Mack, each of whom identified only appellants Waller and Patterson, and each of whom was asked nothing about a third assailant. Appellant Gaskins again sought to introduce evidence that these witnesses had given police descriptions of a third individual with physical characteristics different from his. The trial court again prohibited this.

Appellant Gaskins asserts that he was thus denied his Sixth Amendment right to confront witnesses against him. He argues that witnesses Reid, Williams and Mack's incomplete identification testimony on direct examination opened the door to completion of that testimony on cross-examination, because although this testimony referred specifically to his codefendants only, it had the effect of implicating all three defendants jointly.

In *Smith v. United States*, D.C.App., 330 A.2d 519 (1974), appellant, charged with burglary and armed robbery of a drug dealer, defended that he bought marijuana from the dealer, and had simply returned it for a refund after use of the drug made him ill. He sought to introduce this defense during the government's case-in-chief by cross-examining government witnesses whose direct testimony had not addressed the matter. The trial court prohibited this, and we held that the trial court had not abused its discretion in doing so.

> The general rule in this jurisdiction is that it is proper to permit upon cross-examination the bringing out of anything tending to contradict, modify, or explain the testimony given by a witness on his direct examination . . . . But, while

> cross examination is a basic right, it is subject to reasonable regulation by the court in the interest of an orderly and expeditious trial. [*Id.* at 520 (citations omitted).]

In *United States v. Stamp*, 147 U.S.App.D.C. 340, 458 F.2d 759 (1971), *cert. denied*, 406 U.S. 975 (1972), the court observed that

> it is the trial judge's duty to see that the evidence is presented to the jury in as orderly and intelligible a manner as possible. To accomplish these ends the trial judge in limiting cross-examination must necessarily be entrusted with a great degree of discretion. [*Id.* at 354, 458 F.2d at 773, *citing*, *e.g.*, *Baker v. United States*, 131 U.S.App.D.C. 7, 401 F.2d 958 (1968); *cf. Springer v. United States*, D.C.App., —— A.2d —— (No. 11958, June 6, 1978).]

In the instant case, appellant Gaskins sought neither to contradict nor to modify the testimony of the three government identification witnesses. At most, it can be said, by resort to liberal interpretation, that he sought to explain; to apprise the jury that the witnesses had implicated only his codefendants and had provided pretrial descriptions exculpating him. Balanced against this was the trial court's duty to ensure orderly presentation of evidence. We note that in limiting cross-examination here, the trial court did not preclude appellant Gaskins from calling witnesses Reid, Williams and Mack in his case-in-chief.[12] Appellant Gaskins' failure to do so is in-

[12] Appellant Gaskins' reliance on *Chambers v. Mississippi*, 410 U.S. 284 (1973) is misplaced. There, petitioner was tried for murder, and called as a witness one McDonald, who had made, but later repudiated, a written confession to the killing. McDonald had also on three occasions orally admitted com-

consistent with his instant assertions of prejudice.[13] We find no abuse of the trial court's discretion.[14]

Appellants' convictions are

Affirmed.

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mitting the murder for which petitioner was on trial. At trial, petitioner was prohibited from cross-examining McDonald by Mississippi's common law voucher rule, which proscribed impeachment of one's own witnesses. Petitioner was held to vouch for McDonald's credibility, and was stuck with the latter's responses to his questions. The Court reversed, holding that application of the voucher rule denied petitioner a fair trial. There, cross-examination had been cut off *in limine*, on the issue of McDonald's credibility. In the instant case, appellant was denied only the opportunity to cross-examine government witnesses on a topic not discussed on direct examination.

[13] Appellant Gaskins contends that he was prejudiced by the trial court's allegedly erroneous restriction of cross-examination because he was positively identified by only one of the eight surviving victims of the crime, witness Lena M. Hunter. This assertion ignores the fact that appellant Gaskins was implicated prior to trial by appellant Patterson, and at trial by Channeta Patterson (*see* note 2, *supra*). It ignores also the testimony of Metropolitan Police Detective Otis Fickling, who told the jury that appellant Gaskins had been hiding at the time of his apprehension, and who recalled that after having been advised of his rights and informed that two other subjects had been arrested, appellant Gaskins replied, "there was [*sic*] more than three people involved in this homicide. That shows you what you know about your case."

[14] Appellant Patterson contends individually, and without citation to any authority, that the trial court erred in failing, sua sponte, to find him incompetent to stand trial. We have examined this contention and find it entirely without merit.

District of Columbia
Court of Appeals

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED AUG 17 1978

Alexander L. Stevas
Clerk

No. 10881

DEWAYNE WALLER

Appellant

v.

46393-75

UNITED STATES

Appellee

BEFORE: Newman, Chief Judge; Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris, Mack and Ferren, Associate Judges

O R D E R

On consideration of appellant's petition for rehearing en banc and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that the en banc petition is denied.

PER CURIAM

FOR THE COURT:

GEORGE R. GALLAGHER
Acting Chief Judge

Copies to:

Honorable Eugene N. Hamilton
Judge, Superior Court of the District of Columbia

Clerk, Superior Court of the District of Columbia

Wilhelmenia R. Cooke, Esquire
1914 Sunderland Place, N.W.
Washington, D.C. 20036

John A. Terry, Esquire
Assistant U.S. Attorney

jar

DISTRICT OF COLUMBIA
COURT OF APPEALS

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

REC'D. NOV 15 1978

Alexander L. Stevas
Clerk

DEWAYNE WALLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Case No. 10881

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Dewayne Waller, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the District of Columbia Court of Appeals, affirming the judgment of conviction, judgment entered July 5, 1978, rehearing denied on August 17, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2) and (3).

By: WILHELMINA REUBEN COOKE

Counsel for Appellant
Court Appointed by the
District of Columbia
Court of Appeals

November 15, 1978

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing "Notice of Appeal to the Supreme Court of the United States" this 15th day of November, 1978, by depositing copies thereof in the United States mail, postage prepaid and addressed to:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

John A. Terry, Esquire
Assistant U.S. Attorney
United States District Court
Constitution Avenue and John Marshall Place, N.W.
Washington, D.C. 20011
Attorney for Appellee

Peter Chatilovicz, Esquire
1815 H Street, N.W.
Washington, D.C. 20006

Frederick H. Sullivan, Esquire
Presidential Building
6525 Belcrest Road
Suite 202
Hyattsville, Maryland 20782
Attorney for Co-appellants

I further certify that all parties required to be served have been served.

Wilhelmina Reuben Cooke

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. _____

DEWAYNE WALLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing "Application for Extension of Time to Docket Appeal" this 15th day of November, 1978, by depositing copies thereof in the United States mail, postage prepaid and addressed to:

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Attorneys for Co-appellants

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Edward J. Kuhlmann
Edward J. Kuhlmann

APPENDIX B

United States Constitution: Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution: Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution: Eighth Amendment

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D.C. Code § 22-105. Persons advising, inciting, or conniving at criminal offense to be charged as principals.

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

D.C. § 22-501. Assault with intent to kill, rob, rape or poison.

> Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not less than two years or more than fifteen years.

D.C. Code § 22-2401. Murder in the first degree -- purposeful killing -- killing while perpetrating certain crimes.

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

DEWAYNE WALLER,	)	
Appellant,	)	
v.	)	Case No. 10881
UNITED STATES OF AMERICA,	)	
Appellee.	)	

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By: WILHELMINA REUBEN COOKE

Counsel for Appellant
Court Appointed by the
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November 15, 1978

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